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## Re-Evaluating the Theoretical Basis and Methodology of International Criminal Trials

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# Re-Evaluating the Theoretical Basis and Methodology of International Criminal Trials

Professor Dermot M. Groome

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PROFESSOR DEL DUCA: We are very happy and pleased to have our next speaker, Dermot Groome, on our law school faculty. He brings a refreshing perspective to this very important subject. Dermot started his career with District Attorney Robert Morgenthau in the Manhattan District Attorney's Office, one of the largest, busiest prosecution offices in the country. He also used his skills to work for human rights groups for several years prior to being called to the ICTY where he was one of its principal prosecutors in the Milošević case.

Dermot brings refreshing enthusiasm, great knowledge and skill to the subject. He carefully treads the difficult path of litigating in a court which is neither common law or civil law in its procedure, but an amalgam of both systems. He has addressed very difficult adjustments and accommodations that have to be made in merging the two procedural systems—no jury trials, dossiers, etc. He excels as an educator. He's been called upon by international agencies and countries around the world to help train a new generation of litigators possessing these special skills. He is indeed a rare breed. Please give a warm welcome to our colleague Dermot Groome.

### Introduction—Why We Must Define a Theoretical Basis

As long as I practice law I will have a vivid memory of a series of meetings I had in the spring of 2001—meetings with my staff of lawyers and investigators in the Yugoslav war crimes tribunal. I had set before

them the task of identifying crimes which they considered essential for the Bosnia indictment against Slobodan Milošević. We had evidence of so many crimes I decided to limit the indictment to the crimes which occurred in only a small number of the multitude of municipalities in which crimes occurred. Before I implemented this admittedly arbitrary criterion, I gave my staff an opportunity to convince me why a particular crime simply had to be in the indictment. I will never forget the looks of disgust as I dropped the horrific crimes they had labored to investigate. My goal at that stage was to draft the smallest, most efficient indictment possible that reflected the different crimes Milošević was responsible for—crimes like murder, rape and destruction of religious property and also reflected the ways in which crimes were committed—for example through political structures, the army, the police and paramilitaries.

So the large body of crimes was dispassionately whittled down to what I believed to be the absolute minimum number. When the indictment was made public there was a loud outcry from victims' groups criticizing us for having omitted many notorious crimes. During the trial the court continually challenged us to reduce the size of our case and each day we held a meeting reviewing the previous day's gains and considering how we might further prune our indictment.

The first great experiment in international criminal justice was of course Nuremberg—Representatives of the four victors US, UK, France and the Soviet Union struggled with the same issue of how to appropriately reflect criminal acts of such magnitude in an efficient trial process. Jackson suggested that the task could be accomplished by adapting the best features of the two major systems—the adversarial and the inquisitorial. Employing the principles of efficiency and fairness they selected the best of both, merging them to create the first truly international criminal trial. The principles of fairness and efficiency have remained, for the most part the primary bench marks—guide posts for improving our international trial system at the *ad hoc* and hybrid tribunals as well as the International Criminal Court.

I come to this podium today to speak about what I believe the future of international criminal justice to be. How I envisage it will develop and what I believe to be necessary in order for it to reach its full potential. As we proceeded through the prosecution case, constantly beset by Milošević's illness and other delays that are simply an inherent part of large international criminal trials—those of us involved with the case came to see that despite our best efforts at designing an efficient prosecution we were still left with a case that exceeded the international community's patience.

The principles of efficiency and fairness have taken us as far as they might. A murder trial for a single victim before a hard-driving judge in

Manhattan usually takes one to two weeks. In Milošević, our proof of a serious massacre would most often be introduced with a single witness in a couple of hour—very often the prosecution's evidence was nothing more than spending a few minutes to ask a witness to attest to their written statement and then making the witness available to Milošević for cross-examination. While some may disagree—I do not believe the Bosnia cases against Milošević could have been proven more efficiently under our present system of international criminal trials.

We have had these trials in sufficient numbers and under sufficient circumstances that we can now begin to re-evaluate the theoretical basis of these trials. To define what we are trying to accomplish through them with precision and then develop the best procedures to implement those goals. While our inquiry must not capriciously abandon the time-tested goals and methods of its ancestral roots it must not be bound with an unreflective filial devotion. It is only after we carefully define that theoretical basis that we can realize the full potential of international criminal justice. With the time I have, let me suggest four principles that are integral to that basis and invite you to imagine with me how our trial methodology might evolve as a result.

The future of international criminal justice must spring from its own theoretical basis—and depart from being a process that has been cobbled together from the adversarial and inquisitorial systems designed to achieve different aims.

### Practical Considerations

Let me recognize at the outset the important hermeneutical considerations involved in this process. Across the broad spectrum of different legal cultures, there are different conceptions of core concepts such as “fairness,” the “right to confrontation,” “the right to self-representation.” These concepts do not share a common universal definition nor are they static. An understanding of their meaning is not independent of what the interpreter brings to the interpretation. These differences become most apparent when we try to merge different legal traditions to develop a single international criminal process.

During a difficult session of negotiations at the London Conference, where the Allies gathered to design the first international criminal trial, Justice Jackson suggested that that their different ideas of what constituted a “fair trial” might prove to be irreconcilable and that it would be better to agree in London that an international criminal process was impossible rather than demonstrate it in Nuremberg.

Like my colleagues from other systems, I feel the same visceral discomfort each time I ventured out from my own legal culture. During

the Milošević case when it became clear that acting as his own attorney, combined with his poor health was dictating the pace of the trial the prosecution team discussed at length the question of imposing counsel. While my colleague, an experienced prosecutor from Germany thought it was a sensible solution and entirely consistent with her legal culture—being from the U.S., I was very troubled by it and openly considered whether it was a position I could ethically advocate.

While core values like fairness serve as a compass, permeating all that we do as lawyers they can also stifle earnest attempts to improve the adjudication process and can impede the healthy and necessary development of legal systems.

Changes that implicate these core values, are difficult not only because they challenge deeply held notions of justice and fairness but because they pose a threat to us—for to consider the merits of another methodology is to critically reflect on whether our own method is truly fair.

The late judge May was the presiding judge over much of the Milošević trial. He was also a respected author of several important books on evidence. In applying an essentially adversarial conception of fairness to the Milošević defense case he determined that fairness required that Milošević be given the same amount of time the prosecution used in presenting its case. At the outset it seemed like a sensible and unassailably fair way of proceeding—careful calculations were made to implement this decision. But as the case dragged on and it became clear that Milošević was using this time not so much to contest the Prosecution's case but to make political statements, we on the prosecution came to realize that this generous allotment of time actually did little to further the goal of "fairness." I suspect it contributed little to the judge's talk of fairly determining the issues before them.

The future of international criminal justice calls us to develop our own conceptions—to redefine core concepts of our respective legal traditions. To find new nuanced conceptions that reflect not only the historical but the evolving concepts of international criminal justice. To use the language of Hans Gadamer we must engage in a hermeneutical "conversation" in which we come to accept "the full value of what is alien and opposed to" our own unique understanding of these concepts. It is only then we can have what Gadamer calls a "fusion of horizons"—a commonly shared understanding of international criminal law's core concepts.

## The Principles

### *Principle 1: Implementing International Norms and Policies*

Let me describe the first of the four principles that define the theoretical basis of international criminal trials. This most fundamental and animating principle is the implementation of international norms.

There is now a large comprehensive body of international criminal norms embodied in numerous treaties, in customary law and in the jurisprudence of the tribunals. Together this creates the corpus of substantive law which is applied in international criminal courts. This body of law reflects some of the most important norms and policies that define us as a global civilization and that we as an international community seek to promulgate. These norms fall into two broad substantive categories. The first category as articulated in the Geneva Conventions and customary principles governing the conduct of war recognizes that as long as armed conflict is an inescapable part of international relations we must mitigate its effects whenever possible.

The second category as embodied in crimes against humanity and genocide protect the integrity of the individual and the most fundamental of human rights from wholesale infringement. These policies establish baseline standards governing the treatment of all people and sanction those who bear individual criminal responsibility for transgressing these normative boundaries.

The UN Security Council in Resolution 808/1993 recognized the relationship between the violation of these norms and the threat to international peace and security. The two *ad hoc* tribunals have the primary purpose of furthering peace and security through the enforcement of these norms. The preamble of the Rome Statute reminds us that grave violations of international law “threaten the peace, security and well-being of the world.”

How do we best implement and enforce these policies? How do we enforce them in a way that best secures the peace, security and well-being of the world?

Perhaps the best place to begin is to remind ourselves of the essential characteristics of the adversarial and inquisitorial systems—remind ourselves of their essential theoretical distinctions. Both systems have developed over relatively long periods, worked out substantial imperfections and are accepted today as two fair and effective ways of adjudicating criminal liability.

I recognize the work of John Langbein and Mirjam Damaška in articulating the theoretical bases of our two primary systems of adjudication—the adversarial and inquisitorial systems.

The adversarial system, tracing its origins to 13<sup>th</sup> Century England established a forum in which opposing parties could square off before an impartial judge to settle a dispute. A judge that was uncorrupted by advance knowledge or some loyalty to one of the parties. The goal and method was designed to be a “fair contest” between two perhaps unequally situated parties. To take two possibly disparate adversaries and set them loose in a forum in which they could have a “fair fight.” In time, lawyers were given a central role in these proceedings and we now have a system in which the formulation of the allegations, the conduct of the investigation, the production of proof, the testing of that proof all remain in the control of the two opposing sides represented by attorneys. This intentionally partisan process culminates climatically on their “day in court”—the concentration of months of pre-trial preparation into a condensed dramatic courtroom battle. The judge or jury’s role is largely passive. Our faith in the adversarial system lies largely in the belief that the truth will emerge during this fair contest.

Is it the goal of international criminal trials to make the international community and the lone individual defendant equal combatants in a fair contest? Can we ever reduce a contest between the international community and an individual defendant to a fair contest on the same terms envisaged by the early architects of the adversarial system? They might remark today that we have asked this simple solution to simple controversies to do something it was never intended to do. While international judges, in my experience, can and most often do ensure that courtroom proceedings conform to traditional conceptions of adversarial fairness their largely passive role in the overall process leaves them unable to more proactively engage the process in a way that uncovers the truth more efficiently and fairly. Caught in the paradigm of trial as “dispute resolution” they are intentionally constrained from developing a truth seeking process that is fair.

Milošević saw the trial as a “dispute”—a debate on the validity of NATO’s interventions in the Balkans and its bombing of Serbia. In fact, it was the international community seeking to fairly determine whether he had violated international norms. The adversarial aspects of the trial process, better suited for dispute resolution were easily manipulated by Milošević to his ends.

The inquisitorial or continental system has its roots in canonical law and was developed by the Catholic Church to implement church policy. As it was adapted for use in secular society it developed into a system of investigation and adjudication that entrusted the task of investigation, the introduction of evidence and the adjudication of facts to trained impartial professionals. In its modern form, the inquisitorial system charges a judicial officer with the task of investigating an event in a fair and

balanced way, impartially assessing evidence to determine the truth and fairly applying international policies and norms expressed in the law. The “day in court” is replaced with a multi-stage process designed to avoid the inflamed passions of a dramatic courtroom battle with the careful deliberate dissection and evaluation of evidence. The truth is not entrusted to a “fair contest” but to a “fair process” guided by an impartial hand with input from the prosecution and the defense.

The theoretical basis of international criminal trials is not to create a “fair contest” to resolve a dispute—but to accurately and fairly identify, investigate and adjudicate which individuals have violated international norms. It is my assertion that accurately identifying and adjudicating transgressions of international norms is the foundational and animating principle of international criminal trials. Further, once we accept this we must recognize the affinity that exists between the international criminal trial and its inquisitorial parent. International criminal trial procedure must abandon its reliance on the adversarial process to yield the truth and develop its own methodology to uncover the truth in a process that fairly strikes the balance between the rights of the defendant, the victim and the international community.

In doing this we see some tools of the continental judge are well suited for the international criminal judge. The dossier. In the inquisitorial model the dossier is the repository of the evidence. The process of investigation and evaluation generate a body of credible and reliable evidence that can form the basis of later deliberations. The inflexible ban on advance knowledge of a case in the adversarial system prevents the use of dossiers—something that has been carried over to international criminal trials. General Nikitchenko of the Soviet delegation at the London Conference was one of the first to point out the fallacy of procedures designed to shield judges from allegations covered so broadly by the media.

Recognizing this principle requires us to redefine the roles of the judge, the prosecutor and even the accused in their respective roles at trial.

The Prosecutor is not a partisan adversary but a judicial officer charged foremost with determining the truth. My old boss at the Manhattan DA’s office espoused this view, he used to impress upon us this vital responsibility of a prosecutor. There were several occasions during the course of my career there when, my task became to identify and uncover the evidence that would reveal the truth and exonerate a wrongfully accused defendant. An obligation incorporated into the ICC in Article 54. Towards the end of the prosecution case in Milošević when my staff tired of combing through newly acquired documents for evidence that might help Milošević I reminded them of our duty and



reminded them if we were to discover reliable evidence that exculpated Milošević our responsibility would require us to amend our theory of the case even if that meant seeking his exoneration—while certainly embarrassing it would be the only honorable course given our duty as prosecutors. Methods must be developed that insulate international prosecutors from the temptations of partiality, the seduction of prominent convictions and craft a role different from the traditional role of a prosecutor as adversary.

Lest you think I am advocating for a wholesale shift towards inquisitorial methods—I am not. I am advocating for clearly articulating the goals of international criminal trials and then shaping the methods to fit—many will be adaptations of already existing methods. For example, I would abandon the obligation of a continental prosecutor to bring all charges supported by prima facie evidence. In its place I would adopt the practice of many prosecutors in adversarial systems that they exercise their discretion to only initiate charges supported by prima facie evidence for which they believe there is a strong probability of success. A discretionary decision involving something substantially more than a mere prima facie case.

*Principle 2: Minimize the Excesses of War*

My second principle. On June 24, 1859 Henri Dunant, the founder of the International Committee of the Red Cross, stood boot-deep in blood in the aftermath of Solferino surrendering to the apparent inevitability of war he sought a way to minimize the suffering it occasioned. Integral to the theoretical basis of international criminal justice must be a consideration as to how its methods further this paramount purpose of international humanitarian law. While the eradication of impunity hopefully becomes a deterrent to a violation of international norms—the methodology we employ must be informed by and contribute to a reduction of the excesses of armed conflict. The future of international criminal justice must not only seek to hold violators accountable but must proactively make it more difficult to violate the laws and customs of war.

Imagine with me how this might be reflected in methodology. Recall the recent conflict between Hezbollah and Israel Defense Force and the bombing of the apartment complex in Cana. A Human Rights Watch investigation determined that a massive bomb caused a building to collapse on dozens of civilians mostly children. They did not find evidence that the building and its civilians were being used as shields by Hezbollah. Is it possible for us to imagine that a commander who orders the bombing of a clearly identifiable civilian target does so knowing that

he or she will have a legal obligation to explain their decision? The right to remain silent is one of the cornerstones in the protection of our civil liberties. Presently, there is no basis in international law for abrogating the right to remain silent in any way. It is now deeply ingrained in most modern systems of criminal justice.

Can we at least temporarily suspend our reflexive rejection of anything that would threaten this inviolable principle and examine the reasons underlying it in a consideration of possibly recalibrating the right in a way that appropriately balances the right against self-incrimination and the unjustified taking of civilian life? If during the course of this fair inquiry into the truth an international court determines that there is uncontested *prima facie* evidence that a non-hostile civilian target was deliberately targeted by an accused, resulting in the loss of civilian life—if a court determines that this point has been reached—is our offense at the thought of the court asking the accused “why” really justified? Is it so abhorrent that silence in the face of such evidence may be interpreted by judges as the absence of any legal justification for targeting the civilian structure?

Is it fundamentally unfair for the international community to require an explanation from those persons with uncontested authority and responsibility for targeting decisions to justify the intentional taking of civilian life?

### *Principle 3: Reconciliation and Integration with Local Justice Efforts*

Let me leave this principle—a process that itself mitigates the excesses of war and describe my third principle. As Ambassador Okun has eloquently described—furthering reconciliation is an important reason why we engage in international criminal justice. We must repair the fissures of war. The oppressed must once again live among those who were complicit in oppression. The children of the ethnically cleansed must play in the same school yard as the children of the ethnic cleansers. We expect international criminal justice to make a constructive contribution to this process. We humbly accept that international criminal justice can only contribute partially to this process—reconciliation must also depend upon reconstitution of national criminal justice capable of dealing with these international crimes.

The time for an international tribunal to examine how its proof may be used in local proceedings is not in the midst of a closing strategy but in designing the architecture of international trials. The large investment of resources for these trials can only be justified if they further reconciliation in fact and provide dividends to those courts that complete the task by adjudicating the guilt of the majority of serious offenders.

International Criminal Trials will always focus on only the most serious offenders. It is a process that allows those that have killed hundreds to fall through the sieve of international justice to the courts below. There must be continuity of proof and method between the large international trials and the national trials of international crimes. International trials must advance local justice for international crimes.

If we adopt as a principal that a fair truth-seeking process replace our adversarial contest then we can empower a judge with the tools necessary to ascertain the truth in these situations. A judgment rendered in this way embodies a set of reliable factual findings that can be applied fairly as rebuttable presumptions in other cases. That can be applied to other defendants in a way that allows them to fairly contest the accuracy of those facts. Under the adversarial—"fair contest" model—findings derived from a contest controlled by two opposing parties are difficult to incorporate into the trial of a third person and still remain faithful to the theoretical basis of the "fair contest." How can a "contest" be "fair" in the traditional adversarial sense to a person who was not present?

#### *Principle 4: Sustainability*

The last principle, of this admittedly incomplete set, which I will speak of today is sustainability. The theoretical basis of international trials must include the concept of sustainability. If the future of international criminal justice is to be realized it must become commonplace—not an extraordinary measure like the *ad hoc* tribunals. It must be expected, commonplace, and sustainable.

National criminal justice systems work because they are predictable and have moral authority. Once they become unpredictable they lose their moral authority and begin to break down—endangering the society itself. Sustainable international criminal justice must be certain in its application, predictable in its process and have the moral authority of the world community.

There is a direct relationship between the efficiency of these trials and the universal enforcement of these prohibitions. For these prosecutions to have a true deterrent effect they must be conducted in a way that can leave no doubt that the international community's resolve to end impunity is not larger than its capacity to do so. Any consideration of trial methods must look further than the immediate considerations of individual trials incorporating larger strategic considerations of ensuring predictable accountability for all senior political, military or police official likely to commit crimes. The ICC is the most significant step to date in this regard. Its success will depend in part upon its ability to ensure global justice with limited resources. The goal of sustainability is

directly dependent on developing a process that is the most efficient one possible.

Let's examine one feature of the adversarial process with significant implications for its efficiency. Consider three of the central functions of an adversarial trial. The first is the questioning of witness and production of proof. The parties are responsible for this function. The second function is performed by the judge—managing the trial process. The final function for consideration is adjudicating the facts. This function is discharged by the jury.

Now let's consider a simple robbery case where the prosecution must prove three elements: 1) there was a theft; 2) there was force and 3) the defendant is the person who committed the act. The prosecutor must produce evidence to prove each of these beyond reasonable doubt. It might be that the jury early in the case has no doubt that there was a forcible theft—a robbery. They have serious concerns with the identity of the perpetrator and are interested anxious to hear all possible evidence in this regard.

The Prosecutor, unable to speak with the jury, does not know this. He therefore, in the prudent discharge of his duties pedantically adduces all of his evidence for each element lest a reasonable doubt germinate in the mind of a juror. What would happen if the trier of fact—if the juror in my example could say, "We have all the evidence we need to decide the first two elements. What we need now is all the evidence available on the issue of identification. How much more efficient does our robbery trial become when we empower the fact-finder to direct the inquiry rather than stifling our fact-finder in name of impartiality. By combining these segregated functions we increase the efficiency of the trial process.

After having considered the efficiencies gained in a simple robbery trial, consider the exponentially greater efficiencies that can be achieved in a case on the scale of the Milošević case. The trial would have taken a very different course if the Chamber had been empowered to more actively direct the inquiry in a way that met their needs as finders of fact. We, as prosecutors, being forced to blindly anticipate their questions, their potential doubts were compelled to introduce not necessarily the evidence the Chamber most wanted or needed to decide the case but what we perceived they most needed and wanted.

We invited the Chamber on several occasions to take a greater role in directing the focus of the inquiry. They declined for obvious reasons—expressing a view that we presented sufficient evidence on an issue would create an impression (abhorrent in an adversarial system) that the trier of fact had a view of the evidence before hearing all of the evidence and the arguments of both parties. *The court was inextricably*

*shackled to adversarial notions designed for a national court.* Can we not entrust professional judges to keep an open mind with respect to the guilt of an accused and yet still determine when they have heard enough evidence on a particular issue?

### Conclusion

I leave you now with these four principles—and invite discussion regarding their implications. They are by no means comprehensive. I am sure my audience here and scholars and practitioners elsewhere can identify important principles that must also be part of the theoretical basis of international criminal trials. It is important that we fully and earnestly engage in the task of defining this theoretical basis—identify its benchmarks so we can be guided as we struggle to correct the inadequacies of today's methods and develop new methodologies. International criminal justice must mature into a juridical entity intentionally designed to realize its unique mandate and potential.

The test of our success is whether this nascent legal system fairly adjudicates individual responsibility, whether it effectively and uniformly enforces international norms, whether it mitigates war's unconscionable results, whether it furthers reconciliation and that it achieves all of this in a sustainable way. International criminal justice must establish with certainty and predictably our resolve to end impunity—it must become expected and routine. The future of international criminal law lies in it becoming our ordinary response to extraordinary crimes.